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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 ANDREA THOMAS,

7 Plaintiff,

8 v.

9 SMITH-PALLUCK ASSOCIATES CORP.,  
10 d/b/a LAS VEGAS ATHLETIC CLUBS,

11 Defendant.  
12

Case No. 2:17-cv-02001-MMD-CWH

**ORDER**

13 Presently before the court is plaintiff Andrea Thomas' Motion for Leave to File First  
14 Amended Complaint (ECF No. 17), filed on February 7, 2018. Defendant Smith-Palluck  
15 Associates Corp. d/b/a Las Vegas Athletic Clubs ("LVAC") filed a response (ECF No. 18), which  
16 is supported by Elana Toliver's declaration (ECF No. 19), on February 21, 2018. Thomas filed a  
17 reply (ECF No. 23) on February 28, 2018.

18 Also before the court is LVAC's motion to stay pending a ruling by the Federal  
19 Communications Commission on TCPA Issues Disputed in this Case (ECF Nos. 38, 39), filed on  
20 July 17, 2018. Thomas did not file a response.

21 This is a dispute regarding repeated calls from LVAC to Thomas on her cellular telephone  
22 regarding a debt. (*See* Compl. (ECF No. 1).) Thomas contends she instructed LVAC to stop  
23 calling her cellular telephone, but she continued to receive calls and voicemails from LVAC,  
24 many of which involved pre-recorded and artificial messages. (*Id.* at ¶¶ 24-30, 39-42.) Thomas  
25 claims LVAC employed an automatic telephone dialing system to place these calls. (*Id.* at ¶¶ 31-  
26 38.) Thomas brought suit against LVAC, alleging claims for negligent and willful violation of  
27 the Telephone Consumer Protection Act ("TCPA") (claims one and two) and for state law  
28 deceptive trade practices (claim three). (*Id.* at ¶¶ 53-73.)

1 Thomas now moves to amend her complaint to (1) allege additional facts about LVAC's  
2 automatic telephone dialing equipment, (2) assert claims for a putative class, and (3) drop her  
3 deceptive trade practices claim. LVAC does not oppose dropping the deceptive trade practices  
4 claim, but it argues amendment to assert class action claims would be futile because Thomas  
5 consented to the calls in her LVAC membership agreement. Thomas replies the class claims are  
6 not futile, because ambiguities in the membership agreement must be construed against LVAC,  
7 and the agreement does not provide for contact through an automatic telephone dialing system for  
8 collections purposes.

9 LVAC moves to stay the litigation, arguing the law on what equipment constitutes an  
10 automatic telephone dialing system is in flux. LVAC points to two forthcoming rulings—one  
11 from the FCC, the agency tasked with construing the TCPA, and one from the United States  
12 Court of Appeals for the Ninth Circuit—arguing that those decisions will alter the law governing  
13 this case. LVAC argues the primary jurisdiction doctrine authorizes the court to stay a case to  
14 allow an administrative agency with subject matter expertise, such as the FCC's expertise on the  
15 TCPA, to rule on an issue within its purview. LVAC further argues the court has the inherent  
16 authority to stay this case for efficiency reasons. For instance, LVAC states the parties and the  
17 court should not expend resources on discovery, motion practice, and trial, only to have to "redo"  
18 the work when the FCC and Ninth Circuit render decisions that bear on whether the dialing  
19 equipment used in this case qualifies as an automatic telephone dialing system under the TCPA.  
20 Thomas does not oppose the motion to stay, which constitutes a consent to the granting of the  
21 motion under Local Rule 7-2(d).

22 Having reviewed and considered the unopposed motion to stay, and for the reasons stated  
23 in the motion, the court will stay this litigation pending the FCC or Ninth Circuit's ruling,  
24 whichever is earlier. In particular, the court is persuaded that a stay is appropriate because it  
25 appears the FCC is poised to determine whether dialing equipment similar to the equipment at  
26 issue in this case, i.e., the Nuxiba System, satisfies the TCPA's definition of an automatic  
27 telephone dialing system. The deadline to file public comments with the FCC on this issue  
28 expired on June 28, 2018. Further, in *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir.),

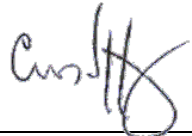
1 a case involving what type of dialing equipment constitutes an ATDS, appellate briefing and oral  
2 argument were complete as of May 11, 2018. Given that the court is staying the litigation, it will  
3 deny the motion to amend without prejudice for Thomas to renew the motion and for the parties  
4 to supplement their briefs, if necessary, after the stay is lifted.

5 IT IS THEREFORE ORDERED that defendant LVAC's unopposed motion to stay this  
6 case (ECF Nos. 38, 39) is GRANTED as stated in this order.

7 IT IS FURTHER ORDERED that the parties must promptly file a joint status report upon  
8 receipt of the FCC or the Ninth Circuit's decision, whichever is earlier. Meanwhile, the parties  
9 must file a joint status report by January 4, 2019, and every 120 days thereafter, until the stay is  
10 lifted.

11 IT IS FURTHER ORDERED that Thomas' Motion for Leave to File First Amended  
12 Complaint (ECF No. 17) is DENIED without prejudice. After the stay is lifted, Thomas may file  
13 a notice renewing the motion to amend. If the motion is renewed, the court will entertain the  
14 parties' proposals, if any, for a schedule for supplemental briefing on the motion to amend.

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16 DATED: September 6, 2018

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20 C.W. HOFFMAN, JR.  
21 UNITED STATES MAGISTRATE JUDGE  
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